Filed 7/30/02 P. v Badgett CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN THOMAS BADGETT, JR. Defendant and Appellant.	F036805 (Super. Ct. No. 79969) **MEMORANDUM OPINION (People v. Garcia (2002) 97 Cal.App.4th 847)**
In re JOHN THOMAS BADGETT, JR., On Habeas Corpus.	F037931

ORIGINAL PROCEEDING and APPEAL from a judgment of the Superior Court of Kern County. Roger D. Randall, Judge.

Marybeth Halloran, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Acting Chief Assistant Attorney General, Mary Jo Graves, Acting Senior Assistant Attorney General, and Louis M. Vasquez and Michelle L. West, Deputy Attorneys General for Plaintiff and Respondent.

-ooOoo-

Appellant John T. Badgett, Jr., was convicted by jury trial in Kern County Superior Court with violations of Health and Safety Code[1] sections 11379.6, subdivision (a) (count 1, manufacturing methamphetamine), section 11377, subdivision (a) (count 4, possession of methamphetamine) and section 11550, subdivision (a) (count 6, being under the influence of methamphetamine -- a misdemeanor). The trial court denied appellant's pretrial Penal Code section 1538.5 motion to suppress evidence seized from his home. The trial court also denied appellant's Penal Code section 1118.1 motion, based upon alleged insufficient prosecution evidence, for acquittal on count 1.

DISCUSSION

I. Sufficiency of the Evidence

The evidence of manufacturing was sufficient to support appellant's conviction under count 1 and therefore the trial court did not err in denying appellant's motion for acquittal. (*People v. Mendoza* (2000) 24 Cal.4th 130, 175 [A trial court should deny a motion for acquittal under Penal Code section 1118.1 when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged].)

Section 11379.6 punishes a person who "manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independent by means of chemical synthesis, any controlled substance." (§ 11379.6) Criminologist Diosi testified to the four stages of methamphetamine manufacture, the various compounds used in the four stages, and the types of equipment needed for each stage. Although Diosi admitted he found no ephedrine or pseudoephedrine in the actual process of conversion to methamphetamine -- in other words in stages one, two or three -- he did testify that, based on his experience and the

---

[1] All further references are to the Health and Safety Code unless otherwise noted.

material found at the house, all stages of manufacturing had occurred, with the compounds actually found being only a small step away from conversion to the final product, methamphetamine.[2] Diosi also testified the various jars of solvent, with sludges containing methamphetamine, ephedrine and pseudoephedrine, were in the last processing stage, with only the final extraction, "filtering," to be completed.

The evidence also showed that officers who searched appellant's house found items used in stage one (two empty bottles of pseudoephedrine, an empty bottle of mini-thins (a formulation containing ephedrine), denatured alcohol, and clean filters).[3] Although the officers did not find compounds used in stage two of the process (red phosphorus or hydriotic acid),[4] they did find compounds used in stages three and four (lye, liquid iodine, cat litter, MSM, filters and nonpolar solvents such as camping fuel, acetone and toulene).[5] The officers also found a number of items commonly associated with illicit drug labs (hoses, glassware, hot plate, respirator and funnels), all with residue of methamphetamine or its precursers (ephedrine or pseudoephedrine), and a scrap of paper with what appeared to be references to several basic ingredients of methamphetamine (ephedrine, phosphorus and iodine).

Even if we agreed with appellant that "filtering" is not an act proscribed by section 11379.6, an issue we avoid, Diosi's testimony, as well as the other physical evidence

---

2 Although no precursor to methamphetamine was found in an earlier stage of the process, there was evidence of items and compounds used in earlier stages. This evidence is certainly circumstantial evidence that the earlier stages had occurred.

3 Diosi testified the combination of ephedrine and pseudoephedrine is not found in pharmaceuticals, so the presence of these items together suggested methamphetamine was being manufactured.

4 Diosi testified one could not make methamphetamine from just pseudoephedrine and water.

5 Diosi testified that the strong chemical smell emitted from the cat litter was indicative of manufacturing.

found in the residence, allowed the jury to rationally infer that appellant was not simply filtering methamphetamine purchased on the street but instead was manufacturing the drug and completing the last step of an incremental process.[6]

There need not be evidence of each stage of the manufacturing process to prove a violation of section 11379.6. (*People v. Stone* (1999) 75 Cal.App.4th 707, 715; *People v. Heather* (1998) 66 Cal.App.4th 697, 703-704; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 812-813; *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503; *People v. Combs* (1985) 165 Cal.App.3d 422, 427.) These authorities all involved cases where there was evidence of the early stages of manufacturing without evidence of a final product. Although appellant's case involved evidence of a nearly final product without direct evidence of the occurrence of earlier stages of the process, the distinction is not significant. The Legislature intended to make each and every stage of the process illegal. (*People v. Stone, supra*, 75 Cal.App.4th at p. 715.)

Nor was it necessary for Diosi to testify with absolute certainty that manufacturing was occurring. (*People v. Lancellotti, supra*, 19 Cal.App.4th at pp. 812-813 [criminologist could not say that manufacture of methamphetamine was actually taking place because all components of the lab were found boxed and only incremental stages present].) The jury was free to evaluate the evidence given, draw any permissible inferences, and reach its own conclusion about the likelihood that appellant had been manufacturing methamphetamine. (*People v. Rayford* (1994) 9 Cal.4th 1, 23 [test of

---

6 Although we also are not required to decide this issue, we note the language of the statute is quite broad and includes words like "converts," "processes" and "prepares." These words are not ambiguous in meaning and we cannot fathom why extracting a sludge from a solvent by filtering or other means in order to "convert" the sludge to usable form, or to "prepare" the sludge for use, should not be considered activity intended by the Legislature to come within section 11379.6.

sufficient evidence]; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

II. Search

The trial court did not err in denying appellant's motion to suppress.

First, there was sufficient evidence to support the trial court's implicit finding that Winkel, a probationer with a search condition, "lived," as the word is commonly understood, at appellant's home and that Winkel had mutual use -- joint access and control -- of that home.[7] After January 19, the police received information that Winkel was staying with appellant. A phone book located during another unrelated search listed Winkel with a phone number traced to appellant's apartment. The police had seen Winkel leaving the area of the apartment approximately 10 days before February 16, and a confidential informant told police that Winkel was staying with appellant. Although Winkel was apparently not paying rent to appellant, Winkel had a key to appellant's house, told police he was staying there, kept his personal belongings there, and brought his young son there to stay with him. It was known by others that Winkel could be contacted at appellant's home. Whether a temporary arrangement or not,[8] Winkel had

---

[7] We hereby take judicial notice of the docket in Kern County Superior Court case No. RM018522A, *People v. Winkel*, showing the grant of probation and the terms of the probation conditions ordered on May 13, 1997. There is no suggestion that the police officers were using Winkel's probation clause as justification to collect evidence against appellant. The officers searched appellant's home because they believed Winkel lived there. If this was so, the portion of the house under Winkel's control, sole or joint, was subject to search under Winkel's probation search condition. (See *U. S. v. Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U. S. v. Dally* (9th Cir. 1979) 606 F.2d 861, 863.)

[8] This case is distinguishable from *Perez v. Simmons* (9th Cir. 1988) 884 F. 2d 1136, a case cited by appellant. In *Perez*, the brother was found to be an occasional overnight guest only. The court expressly found the brother could not be considered a co-resident simply because he spent the night at his sister's home on occasion. (*Id.* at p. 1141.) Here the trial court implicitly found Winkel was a co-resident.

full access[9] to appellant's house. Furthermore, nothing in Suell's trailer suggested Winkel lived there. No personnel belongings of any kind were found in the trailer, confirming the information collected from January 19 to February 16 to the effect that Winkel had moved to appellant's house.

Because Winkel was a co-inhabitant of the house with appellant, appellant assumed the risk that Winkel would consent to a police search of those areas inside the house to which Winkel had access and at least joint control. (*People v. Woods* (1999) 21 Cal.4th 668, 676; see also *People v. Smith* (2002) 95 Cal.App.4th 912, 919; *People v. Veiga* (1989) 214 Cal.App.3d 817, 821 [a co-inhabitant with equal common authority may consent to search].)

Second, the search pursuant to the probation search clause applicable to Winkel did not exceed the scope of the clause. (*People v. Woods, supra,* 21 Cal.4th at pp. 673-674 [standards of review].)[10] The information possessed by the police permitted a search of Winkel's bedroom and all areas over which he had common control, including the

---

9 Appellant argues Winkel did not have full access because the front door had two locks and Winkel only had a key to the dead bolt. There are two possible inferences which can be drawn from this fact. One, Winkel's possession of the single key could not give him access to the house; obviously, if two keys were needed to open the door, one key alone would not provide access. Two, Winkel's single key provided access because in fact, only one key was needed. It could have been a practice of the residents of the house to lock only the dead bolt. Or, only the dead bolt worked. We are bound to draw all inferences in favor of the trial court's findings of fact, implicit and expressed. (*People v. Woods, supra,* 21 Cal.4th at p. 673-674.)

Actually, these facts are irrelevant. However Winkel might have entered the house, there is no question that he was allowed to do so by appellant because, as we said, the evidence supported a conclusion he lived there. And, the police were allowed entry into the home on the authority of a third person, not Winkel.

10 Officers may only search those portions of a residence over which they reasonably believe the probationer has complete or joint control. In other words, an officer may not generally search a room or area under the sole control of a nonprobationer. (*People v. Woods, supra,* at p. 668.)

kitchen, garage, living room, bathroom and other common areas of the house. (*People v. Clark* (1993) 5 Cal.4th 950, 979; *People v. Smith, supra,* 95 Cal.App.4th at p. 919; *People v. La Jocies* (1981) 119 Cal.App.3d 947, 955; *U. S. v. Davis* (9th Cir. 1992) 932 F.2d 7522, 758 [consent of cohabitant not needed to search common areas of residence and bedroom used by one giving consent]; *U. S. v. Denberg* (7th Cir. 2000) 212 F.3d 987, 988 [girlfriend who lives on premises and has key to gun cabinet can consent to search]; 4 LaFave, Search and Seizure (3d ed. 1996) § 10.10(d), at p. 778.89 [if a parolee shares living quarters with someone else, a permissible warrantless search may extend to all parts of the premises to which the parolee has common authority].)

The officers did not have authority to search appellant's bedroom, an area over which appellant had sole control. (See, e.g., *Lenz v. Winburn* (11th Cir. 1995) 51 F.3d 1540, 1549-50 [grandparents lacked reasonable expectation of privacy in closet in their home used exclusively by granddaughter].) However, the officers did not search appellant's bedroom as part of the probation search attributable to Winkel, but did so pursuant to other legally recognized exceptions to the warrant requirement -- officer protection, plain view, and consent. (*People v. Seaton* (2001) 26 Cal.4th 598, 632 [permissible for officers to "sweep" the premises to see if in fact anyone else is present]; *People v. Glaser* (1995) 11 Cal.4th 354 [detention of bystander during service of search warrant permissible]; *People v. LeBlanc* (1997) 60 Cal.App.4th 157, 163 [police could seize cocaine pipes in plain view while serving arrest warrants].)[11] After the officers saw

---

11 The police officer found the door to the northwest bedroom slightly ajar and pushed it open. As he did so, he saw appellant standing in front of a dresser with several items, including a white dish containing a white, crystal substance believed to be methamphetamine, an electronic scale and some ziplock baggies. Appellant was taken downstairs where he told officers that Winkel slept on the couch when he spent the night and kept his clothes in the northeast bedroom closet. The officer asked appellant if he could search his bedroom and appellant said "yes." Later, appellant gave written consent to search the entire residence.

the probable illegal items in plain view in appellant's bedroom during the course of the protective sweep, appellant was lawfully detained and removed to the living room, where he then gave his consent for the officers to search his bedroom. The consent by appellant, not Winkel's probation search clause, legally justified the search of appellant's bedroom. Contrary to appellant's assertion, the evidence supports the conclusion that appellant's consent was voluntary and not "a mere submission to authority, . . . inextricably bound up with unlawful conduct."

Third, because the search of the residence and its scope was permissible under the Fourth Amendment, appellant's trial counsel did not render inadequate representation by not challenging the scope of the search. Appellant could not have been prejudiced by any such alleged failure on the part of his counsel. (*People v. Hester* (2000) 22 Cal.4th 290, 297; *People v. McPeters* (1992) 2 Cal.4th 1148, 1177; *People v. Cox* (1991) 53 Cal.3d 618, 656.)[12]

Last, appellant's trial counsel was not ineffective for failing to raise an issue about police compliance with "knock-notice" requirements before entering appellant's bedroom. Although the knock-notice rule is part of the reasonableness inquiry when considering the constitutionality of searches and seizures (*Wilson v. Arkansas* (1995) 514 U.S. 927; *People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1286), recent cases have consistently held that the "knock-notice" principle does not apply to inner doors. (*People v. Howard* (1993) 18 Cal.App.4th 1544; *People v. Aguilar* (1996) 48 Cal.App.4th 632,

---

12 In his writ petition, appellant argues he was denied effective representation because his trial counsel failed to argue that the scope of the search exceeded that permitted under Winkel's probation search term and that the search was invalid because the officers failed to comply with knock-notice requirements before entering appellant's bedroom.

638; *People v. Pompa* (1989) 212 Cal.App.3d 1308.)[13] Appellant's counsel cannot be faulted for failing to raise a meritless argument.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

_____
Dibiaso, Acting P.J.

WE CONCUR:

_____
Harris, J.

_____
Levy, J.

[13] There are earlier cases holding knock-notice requirements apply to inner doors as well. (*People v. Webb* (1973) 36 Cal.App.3d 460; *People v. Glasspoole* (1975) 48 Cal.App.3d 668; and *People v. Pipitone* (1984) 152 Cal.App.3d 1112.) However, we believe the more recent cases cited are better reasoned and conclude as they do that knock-notice does not apply to inner doors.